Supreme Court, U. S.
FILED
APR 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1249

J. EDWARD DAY, *Petitioner*,

v.

WILLIAM H. AVERY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

JAMES J. BIERBOWER
1625 K Street, N. W.
Washington, D.C. 20006

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1249

J. EDWARD DAY, *Petitioner*,

v.

WILLIAM H. AVERY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the District of Columbia Circuit, in unanimously affirming the summary judgment granted by the United States District Court, misconstrued District of Columbia common law.

2. Whether the affirmance by the Court of Appeals of summary judgment based on the existence of no genuine issue as to any material fact denied Petitioner his Seventh Amendment right to a trial by jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only constitutional or statutory provision involved is the Seventh Amendment to the United States Constitution, which is set forth in the Petition (p. 2).

STATEMENT OF THE CASE

This case involves a narrow and groundless claim by Petitioner, a former member of a Chicago-based law firm, Sidley & Austin ("Sidley"), against the members of the Executive Committee of that firm. In his Complaint, Petitioner alleged, *inter alia*, that Respondents breached their fiduciary duty arising out of certain events surrounding the merger, in October 1972, of the Sidley law firm with another Chicago law firm, Leibman, Williams, Bennett, Baird & Minow ("Leibman"). Petitioner further alleged that the merger and the subsequent events occasioned thereby led him to resign from the firm.

Prior to the merger, Petitioner was a partner in the Sidley firm and was Chairman of its Washington Office Committee. (Pet. 2a).[1] He was not, however, a member of the firm's Executive Committee which, under the Sidley partnership agreement[2] (to which Petitioner was a signatory), had plenary control over all firm matters, including operation of the Washington office. (Pet. 2a). Petitioner's position as Chairman of the Washington Office Committee was principally that of liaison with and agent for the Executive Committee rather than that of independent decision-maker. (Pet. 2a–3a).

Early in 1972, Sidley's Executive Committee was approached by members of the Leibman firm concerning the possibility of merger. After initial discussions, the Sidley Executive Committee, on July 17, 1972, informed the Sidley underwriting partners, including Petitioner (and later all Sidley partners), of the merger proposal, and discussions con-

[1]Pet. ____ refers to the Petition for Writ of Certiorari; Pet. ____a refers to the Appendix to the Petition for Writ of Certiorari.

[2]The relevant portions of this controlling document are set forth in the lower courts' opinions. Pet. 2a, n.2 and Pet. 32a, n.8.

cerning the proposal were held at several firm meetings extending over a period of three months.[3] During the course of the merger discussions within the Sidley firm, it was represented, in writing, that no "partner, associate or lay employee would be any worse, or immediately better, off financially, solely as a result of the consolidation, than he or she was before the event." (Pet. 3a–4a).

Thereafter, all partners of the two firms, including Petitioner, approved the concept of merging the two firms, and the manner of implementing the merger. A new partnership agreement and a Memorandum of Understanding consummating the merger of the two firms were approved and executed by all partners of both firms (including Petitioner), effective October 15, 1972. (*Id.*)

Immediately following the merger, the Executive Committee of the firm—which consisted of the combined executive committees of the merging firms—undertook to consolidate their two then physically separate Washington offices (one of which was located at 15th and "M" and the other at 17th and "I" Streets). Petitioner and his counterpart, who had been head of the Washington Office Committee of the Leibman firm, were made Co-Chairmen of the consolidated Washington Office Committee. A new location for the merged offices was chosen by the Executive Committee, contrary to Petitioner's wishes. (Pet. 4a).

Although the Sidley partnership agreement delegated to the Executive Committee the authority and responsibility to

[3]While Petitioner attended only one of those meetings, he was invited to each of them. As to those meetings he did not attend, he was informed immediately afterward of the results of the meeting and was sent copies of all documents distributed at the meeting. Petitioner expressed approval of the progress that was being made toward merger, and made one suggestion for improving the draft agreements, which suggestion was accepted and incorporated into the final merger documents. (Pet. 3a–4a).

decide all questions concerning firm matters, including the operations of the Washington office, and although Petitioner conceded below that decisions concerning that office had been made, prior to the merger, by the Executive Committee, sometimes without consultation with Petitioner or even over his objections (Pet. Affidavit, pp. 3–6), Petitioner nevertheless took these administrative decisions following the merger as personal affronts. Within approximately two months of the merger, Petitioner voluntarily chose to resign from the firm and ass ted himself with the Washington office of another law firm.

Petitioner then instituted this suit against Respondents. On May 29, 1975, the District Court entered its Memorandum Opinion and Order (Pet. 24a–38a) granting summary judgment in favor of Respondents. On November 10, 1976, the Court of Appeals issued its *per curiam* opinion (Pet. 1a-23a) unanimously affirming the District Court's decision. A Petition for Rehearing was denied on December 8, 1976.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY APPLIED SETTLED PRINCIPLES IN DETERMINING DISTRICT OF COLUMBIA LAW; NO CONFLICT OR IMPORTANT FEDERAL QUESTION IS PRESENTED.

In presenting his first point, Petitioner does not challenge the conclusion of the courts below that he suffered no compensable injury. Petitioner does contend that the Court of Appeals erred in ruling that District of Columbia law did not authorize the recovery of punitive damages absent a showing of compensable injury in an action for misrepresentation.

Petitioner's contention here is not that the Court of Appeals misapplied the standards established by *Erie R. Co.* v.

Tompkins, or that it applied federal instead of "local" law. Rather, it is that the Court of Appeals was incorrect in determining what is the law of the District of Columbia.

Respondents submit that the Court of Appeals correctly found that under the common law of the District of Columbia, no action may be maintained for a misrepresentation unless the plaintiff can show that he had been injured. (Pet. 17a-23a). As the District of Columbia Court of Appeals has held: "To maintain an action of deceit, it must not only be made to appear that the plaintiff has been induced to take, or refrain from action by reason of the willful or reckless misrepresentation of a material fact, but also that through such action or its omission, he has sustained some appreciable damage." *Jackson & Sharp Co.* v. *Fay*, 20 App. D.C. 105, 112 (1902). *Accord, Isen* v. *Calvert Corp.*, 126 U.S. App. D.C. 349, 353, 379 F.2d 126, 130 (1967); *Ward* v. *Deavers*, 92 U.S. App. D.C. 167, 203 F.2d 72, 76-77 (1953); *Chapman Realty Co.* v. *Crump*, 80 A.2d 615, 616 (D.C. Mun. App. 1951).

The Court of Appeals' analysis correctly followed this Court's standards for the determination of state law under *Erie*. As this Court explained in *West* v. *American Telephone and Telegraph Co.*, 311 U.S. 223, 237 (1940), it is the duty of the federal court "to ascertain from all available data what the state law is." *See also Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967).

The Court of Appeals conducted an exhaustive search of the relevant District of Columbia authorities, as well as similar decisions in other jurisdictions, in ascertaining the correct decisional rule applicable in the District. Far from being a rejection of local precedent or a creation of a new rule, the court below exercised its proper role in ascertaining local common law and applying it to the instant diversity action. Thus, there is no basis whatever in this case for Peti-

tioner's argument that the Court's "rejection" of District common law reflects an "improper residue" of the relation between federal and local courts in the District prior to the 1970 court reorganization act when the United States Court of Appeals had appellate authority over local District of Columbia courts. (Pet. 8–9).

It would be a wasteful and inappropriate diversion of this Court's resources to review this unimportant and far from novel question. As this Court has acknowledged on innumerable occasions, lower federal court determinations of state law in an *Erie* context are to be respected and not disturbed:

> "[T]his Court must necessarily depend upon the district courts and courts of appeals for initial determinations of questions of state law; indeed, our practice of deference to such determination should generally render unnecessary review of their decisions in this respect." *Cort* v. *Ash*, 422 U.S. 66, 73 n.6 (1975).

See also Commissioner v. *Estate of Bosch*, 387 U.S. 456, 462 (1967); *Palmer* v. *Hoffman*, 318 U.S. 109, 118 (1943); *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707–708 (1949).

This is especially so where, as here, the Court of Appeals' holding with respect to a specific and narrow question of damages has virtually no general applicability and very little chance of recurrence. It is exceedingly unlikely that the ruling of the Court below has any significant impact in the District, much less is an issue of national scope. Petitioner has failed to demonstrate that this question presents the requisite "special and important reasons" for granting his Petition. (Supreme Court Rule 19(1)).[4]

[4]Petitioner ignores the Court of Appeals' alternate ground for denying him punitive relief on his misrepresentation claim. As the Court below noted, "[A]ppellant has not contended that he is entitled to punitive damages without a concomitant recovery of compensatory damages. . . ." (Pet. 22a–23a). Having failed to present this theory of recovery to either court below (in the face of Respondents' repeated arguments that Petitioner had shown no injury), Petitioner may not now argue that the issue is appropriate for review by this Court. *United States* v. *Edmonds*, 173 U.S. App. D.C. 241, 243 n.11, 524 F.2d 62, 64 n.11 (1975); *Democratic Cent. Com.* v. *Washington M.A.T. Com'n*, 158 U.S. App. D.C. 7, 11 n.16, 485 F.2d 786, 790 n.16 (1973), *cert. denied*, 415 U.S. 935.

II.

THE COURTS BELOW PROPERLY APPLIED WELL SETTLED PRINCIPLES IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT. NO IMPORTANT OR NOVEL FEDERAL QUESTION IS PRESENTED BY THIS DETERMINATION.

Petitioner also contends that the orders of the courts below in granting Respondents' motion for summary judgment violated his constitutional right to a jury trial.

It has long been settled that the availability of summary procedures to determine the existence of genuine issues of material fact does not infringe Seventh Amendment rights. *Fidelity & Deposit Co. of Md.* v. *United States*, 187 U.S. 315, 320 (1902); *King* v. *United Benefit Fire Ins. Co.*, 377 F.2d 728, 731 (10th Cir. 1967), *cert. denied*, 389 U.S. 857; *Page* v. *Work*, 290 F.2d 323, 334 (9th Cir. 1961), *cert. denied*, 368 U.S. 875; *see First National Bank* v. *Cities Service*, 391 U.S. 253, 290 (1968). As this Court held in *Ex Parte Peterson*, 253 U.S. 300, 310 (1920): "No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined."

In the instant case, the motion for summary judgment was decided on the basis of uncontroverted facts and allegations of facts asserted by Petitioner which were, for the purpose of the motion for summary judgment, taken as true by both courts. (Pet. 17a; 28a–30a). Indeed, Petitioner concedes as much:

> "[T]he Court of Appeals recognized that all facts averred by the Petitioner and all reasonable inferences therefrom must be taken as true." (Pet. 9).

Thus, the basis of Petitioner's request for review is merely that the courts below incorrectly applied this standard to the facts of this particular case. Petitioner has totally failed to demonstrate, as he must to justify review in this Court, that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." (Supreme Court Rule 19(1)(b)).

CONCLUSION

Petitioner's claims were carefully considered and rejected by both courts below (Pet. 17a–21a; 30a–33a). In sum, as the District Court accurately stated:

> "What this Court perceives from Mr. Day's pleadings and affidavits is that he may be suffering from a bruised ego but that the facts fail to establish a legal cause of action." (Pet. 37a).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES J. BIERBOWER
1625 K Street, N.W.
Washington, D.C. 20006
Attorney for Respondents